

8/24/99  
THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

FSW/GFR

Opposition No. 103,606

Dage-MTI, Inc.

v.

Medical Technology &  
Innovations Inc., by  
change of name from  
Medical Technology, Inc.<sup>1</sup>

Before Cissel, Quinn and Walters,  
Administrative Trademark Judges

By the Board:

On May 2, 1997, opposer filed a motion for summary judgment with supporting materials. Applicant filed a brief in opposition to the motion with its own exhibits. Both parties filed supplements to include originals of documents

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<sup>1</sup> It is noted that applicant has filed a revocation of power of attorney and appointment of new agent with the Board. Applicant's communication does not indicate proof of service of a copy of same on counsel for opposer as required by Trademark Rule 2.119. In order to expedite this matter, a copy of said communication is forwarded herewith to counsel for opposer, but strict compliance with Trademark Rule 2.119 is required in all further papers filed with the Board.

Moreover, it appears that applicant has changed its name to Medical Technology & Innovations Inc. Applicant is encouraged to record evidence of its change of name with the Assignment Branch of the Office. See 37 CFR §§3.71, and 3.73(b); and TBMP §512.01.

relied upon in their respective papers. Opposer also filed a reply brief, which we have exercised our discretion to consider.

Applicant seeks to register the mark MTI PHOTOSCREENER (with a disclaimer of "photoscreener") for a "camera for detecting ocular abnormalities in a patient." The opposition is based on opposer's prior use and registration of the mark MTI for "monitors, television cameras" and the mark MTI (STYLIZED) for "television cameras, television monitor units, [and] synchronizing generators for close circuit television applications."

In support of its motion for **summary judgment**, opposer offers status and title copies of its registrations, a copy of part of a 1991 article from *Lasers & Optronics*, a trade journal, referring to opposer as the number one camera vendor for biological research and as a vendor of cameras used in ophthalmic research, and copies of pages from *Webster's Third New International Dictionary*, (1961) defining "ocular" as "of, relating to, or connected with the eye" and defining "ophthalmic" as "of, relating to, or near the eye: ocular."

Opposer argues that applicant's mark is **confusingly similar** to opposer's registered marks because it is dominated by "MTI," which is also the dominant portion of opposer's MTI (STYLIZED) mark and the entirety of opposer's

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MTI word mark; that both parties sell goods used in the field of ophthalmics (noting the identification of goods in applicant's involved application and the reference to opposer in *Lasers & Optronics*); that opposer's priority has been established by its existing registrations; and that for the above reasons, there is no genuine issue as to priority or likelihood of confusion and **summary judgment** should be granted.

In support of its response, applicant has submitted an affidavit from applicant's chief executive officer asserting that applicant's cameras "are sold almost exclusively for use by pediatricians and optometrists;" that applicant's affiant is familiar with the market for cameras used to examine patients for ocular abnormalities and is unaware of television cameras being used for such purpose; that he is also unaware of any instances of actual confusion and was not aware of opposer's existence until the commencement of this proceeding. Applicant has also submitted a computerized printout retrieved from the FEDTM database of the *Lexis* legal database system of third-party registrations of marks that include the letters "MTI."

Applicant argues that the identification of goods in applicant's pending application shows that its goods are a specific type of camera used by health professionals to diagnose patients; that television cameras are not used for

this purpose; that the trade channels for cameras that detect ocular abnormalities and television cameras do not overlap; that the relevant purchasers are careful, sophisticated purchasers unlikely to be confused; that the trade journal article discussing opposer's sale of cameras refers to opposer only as "Dage" and not "Dage-MTI" or "MTI;" that the article also does not specify that opposer's cameras are actually sold under the MTI mark or that they are "television cameras" and therefore covered by the registrations, and opposer has not, by affidavit, indicated that the article accurately describes opposer's goods; that opposer's marks are entitled to only a narrow scope of protection because of the existence of numerous third-party "MTI" marks that have been registered; that the marks can be distinguished on the basis of the additional wording "photoscreener" in applicant's mark, which explains the apparent lack of actual confusion despite concurrent use for the past three years; and that for the above reasons, there is a genuine dispute as to whether a likelihood of confusion exists, and summary judgment should be denied.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. Fed. R. Civ. P. 56(c). Opposer, as the party moving for summary judgment on its claims, has the

initial burden of demonstrating the absence of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987).

If opposer meets that initial burden, applicant must then present sufficient evidence to show an evidentiary conflict as to one or more material facts in issue. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to applicant as the non-movant, and all justifiable inferences are to be drawn in applicant's favor. *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA*, *supra*.

In considering whether to grant or deny a motion for summary judgment, the Board may not resolve issues of material fact, but can only ascertain whether genuine disputes exist regarding such issues. *Opryland USA*, *supra*, and *Lloyd's Food Products*, *supra*.

The crux of the dispute in this case is whether there are any genuine issues of material fact as to whether applicant's mark, MTI PHOTOSCREENER (with "photoscreener" disclaimed), as used on or in connection with a "camera for detecting ocular abnormalities in a patient" is likely to cause confusion with the registered marks of opposer, MTI

for "monitors, television cameras," and MTI (STYLIZED) for "television cameras, television monitor units, synchronizing generators for close circuit television applications."

In the present case, there is no genuine issue of material fact as to opposer's ownership of its pleaded subsisting registrations, opposer having submitted current status and title copies of the registrations with its motion for **summary judgment**. Thus, the issue of priority does not arise with respect to the goods recited in the registrations. The record also establishes opposer's standing as a matter of law. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); *Carl Karcher Enterprises Inc. v. Stars Restaurants Corp.* 35 USPQ2d 1125 (TTAB 1995); *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212 (TTAB 1990).

To determine whether there is a likelihood of confusion, the marks are compared for similarities in appearance, sound, connotation and commercial impression; the goods or services are compared to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely; and other factors, such as purchaser sophistication and trade channels of distribution, may also be examined. See *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International*

*Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978);  
*Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738  
(TTAB 1978).

Applicant has disclaimed the word "photoscreener," as descriptive of cameras used to screen patients through photographic images. While a disclaimer does not remove the disclaimed matter from the mark, disclaimed matter typically will not be regarded as the dominant, or most significant, feature of a mark. The mark must still be regarded as a whole, including the disclaimed matter, in evaluating similarity to other marks, but the disclaimed portion may be considered less significant. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); the Trademark Manual of Examining Procedure (TMEP) §1213.11 and authorities cited in that section.

The commercial impression of applicant's mark, as it is actually used, appears to be dominated by "MTI." The specimens of record in the application file show the "MTI" portion displayed in large letters, and separated from the wording "photoscreener" by three horizontal lines. The wording "photoscreener" is displayed in lettering about one-half the size of the lettering style used for the letters "MTI." This actual use, coupled with the descriptiveness of "photoscreener," leaves no doubt that the dominant portion

of applicant's mark is "MTI." This portion is identical to opposer's mark.

Applicant has proffered a printout of third-party registrations of marks that include the letters "MTI" from the FEDTM database of the *Lexis* legal database system, and argues that these establish that opposer's marks are entitled to only a narrow scope of protection. For purposes of summary judgment only, a copy of a trademark search report, made of record as an exhibit to an affidavit, submitted in opposition to a summary judgment motion, may be sufficient to raise a genuine issue of material fact as to the nature and extent of third-party use of a particular designation. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); TBMP §528.05(d).

Here, none of the twenty-three registrations listed in the trademark search report cover cameras or monitors of any type. Only three appear to relate to any goods or services that may have a medical application; the rest cover unrelated products or services. Thus, these registrations are insufficient to raise a genuine issue as to the scope of protection of opposer's "MTI" marks.

Applicant argues that there has been no actual confusion. However, the relevant test is likelihood of confusion, not actual confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion.



*Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990), and TMEP §1207.01(c)(iii).

For the above reasons, there is no genuine dispute as to the similarity of the marks.

Turning to the goods, as opposer's registrations have broadly identified the goods, applicant may not avoid a finding of likelihood of confusion merely by more narrowly identifying its related goods. See e.g., *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973); and TMEP §1207.01(a)(iii).

Opposer's registration for the MTI word mark does not limit its monitors or television cameras as to the nature, type, channels of trade or classes of purchasers. Moreover, opposer has introduced evidence showing that it is perceived as a vendor of cameras for biological research, including cameras for ophthalmic research. In view of the broad and unrestricted identifications in opposer's registrations, we must assume that opposer's goods can be used for purposes similar to those for applicant's goods and may be available to the same classes of consumers and in all possible channels of trade. The *Lasers & Optronics* article further supports opposer's claim that the goods are related.

Applicant argues that the purchasers of the parties' respective goods are sophisticated, but the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983).

For the above reasons, opposer has established priority and shown that a likelihood of confusion exists. Applicant has not shown the existence of a genuine dispute on the issues of priority or likelihood of confusion. Accordingly, opposer's motion for **summary judgment** is granted; the opposition is sustained, and registration to applicant is refused.

R. F. Cissel

T. J. Quinn

C. E. Walters  
Administrative Trademark Judges  
Trademark Trial and Appeal Board